STATE OF MICHIGAN
IN THE SUPREME COURT

HON. KWAME M. KILPATRICK,

Plaintiff-Appellant,

v.

Supreme Court No. 137195
Court of Appeals No. 287462

HON. JENNIFER M. GRANHOLM,
in her official capacity as Governor of the State of Michigan,
and DETROIT CITY COUNCIL,

Defendant-Appellees.

Circuit Court Number: 08-122051 CZ

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EMERGENCY APPLICATION FOR LEAVE TO APPEAL

STATEMENT OF BASIS OF JURISDICTION

Plaintiff-Appellant appeals by filing the instant Application for Leave to Appeal from a final decision of the Court of Appeals. MCR 7.301(A)(2).

Appellate review of the Court of Appeals' decision is properly before this Honorable Court. MCR 7.302(B)(1)(2).

STATEMENT OF QUESTIONS INVOLVED

I. DID THE COURT OF APPEALS ERR WHEN IT AFFIRMED THE DENIAL OF A TEMPORARY RESTRAINING TO ENJOIN THE GOVERNOR'S REMOVAL HEARING AS THE STATUTE AND PROCEEDIGNS VIOLATE THE PLAINTIFF-APPELLANT'S CONSTITUTIONAL RIGHTS.

The Plaintiff-Appellant Says: YES

The Defendant-Appellee Says: NO

The Court of Appeals Says: NO

STATEMENT OF FACTS

Kwame M. Kilpatrick is the twice-elected Mayor of the City of Detroit. In relation to his alleged conduct with respect to two civil lawsuits brought against the City of Detroit and Mr. Kilpatrick as the Mayor of the City of Detroit. Mr. Kilpatrick has been charged with eight felony counts in Wayne County Circuit Court on March 24, 2008, including perjury, misconduct in office and obstruction of justice. That matter is currently pending before Judge Margie Braxton. Mr. Kilpatrick has pled not guilty, asserts his constitutional right to be innocent until proven guilty and is awaiting trial on these charges on a date to be scheduled in the future. (Wayne County Circuit Court Case No.)

On May 20, 2008, pursuant to Art. 7, § 33 of the Michigan Constitution of 1963 and Section 327 of the Michigan Election Law, the Detroit City Council submitted a written petition to the Governor for the removal of Mr. Kilpatrick from the office of the Mayor of the City of Detroit. In response, the Governor, in an extraordinary action, scheduled a hearing in advance of Mr. Kilpatrick's trial in the criminal matter, to decide whether Mr. Kilpatrick should be removed from office for "official misconduct." A scheduling order was released by the Governor's office setting forth deadlines for motions, response briefs and a hearing date of September 3, 2008. A Motion to Dismiss or in the Alternative, Stay Proceedings was filed on August 6, 2008, making many arguments, including that the Mayor would be removed by operation of law if convicted

on any one of the charged felonies, including official misconduct.[1] City Council filed a response to this motion.

On August 25, 2008, Mr. Kilpatrick timely filed his reply brief in support of his motion to dismiss the removal petition pending before the Governor. By 9:00 a.m. August 26, 2008, without hearing argument, the Governor denied Kilpatrick's motion to dismiss the petition or stay the removal proceedings in an 18 page opinion and order.

The Governor has ordered that the removal hearing will be limited to the resolution of two questions:

1. Whether Mr. Kilpatrick, in his official capacity as Mayor of the City of Detroit, authorized settlements in the matters of Brown v. Detroit Mayor, Wayne Circuit Court (Docket No. 03-317557-NZ) and Harris v. Detroit Mayor, Wayne Circuit Court (Docket No. 03-337670-NZ) in furtherance of his personal and private interests; and
2. Whether Mr. Kilpatrick, in his official capacity as Mayor, concealed from or failed to disclose to the Detroit City Council information material to its review and approval of the settlements of those matters.

Under MCL § 168.327, the level of proof required in support of Mr. Kilpatrick's removal is that the Governor is "satisfied" that there is "sufficient evidence" of "official misconduct." This burden of proof is entirely vague and amorphous. In further support of that proposition, the Governor's aids indicated in a telephone conference on August 28, 2008, that she equates "sufficient evidence" with "satisfactory evidence," and that "satisfactory evidence" is evidence which she will determine to satisfy an unprejudiced

1 MCL § 201.3.

mind as to the truthfulness of the matter alleged.

The Governor has made statements in the press indicating her predisposition to the finding that Mr. Kilpatrick should be removed from office. Specifically, the Governor has repeatedly indicated that a quick resolution to Kilpatrick's situation is necessary for the good of the State of Michigan. At present, the only means to a quick resolution within the Governor's control is a rush to judgment for removal from office pursuant to MCL § 168.327. Moreover, in private discussions, the Governor has made statements that leave no question that she has prejudged this matter and is not interested in hearing any of Mr. Kilpatrick's defenses. The Governor is undoubtedly predisposed to remove Mr. Kilpatrick from office.

For the reasons stated herein, Mr. Kilpatrick filed a Claim of Appeal from Judge Ziolkowski's ruling concomitantly with his Motion to Stay the Governor's removal hearings scheduled to commence today, September 3, 2008 at 9:00 a.m. The Michigan Court of Appeals affirmed Judge Ziolkowski's decision and has also denied Plaintiff-Appellant's request for a Stay of Proceedings.

Plaintiff-Appellant is now filing the instant Application for Leave to Appeal with this Honorable Court.

STANDARD OF REVIEW

Issues of constitutional law are reviewed de novo.[2] Questions of statutory interpretation are also a question of law that are reviewed de novo.[3]

2 People v. Harper, 479 Mich. 599, 610, 739 N.W.2d. 523 (2007); People v. Nutt, 469 Mich. 565, 573, 677 N.W.2d 1 (2004).

3 Costa v. Community Emergency Med. Services, 475 Mich. 403, 408, 716 N.W.2d 236 (2006).

ARGUMENT

I. THE COURT OF APPEALS ERRED WHEN IT AFFIRMED THE DENIAL OF A TEMPORARY RESTRAINING TO ENJOIN THE GOVERNOR FROM COMMENCING A REMOVAL HEARING AS THE STATUTE AND PROCEEDINGS VIOLATE THE PLAINTIFF-APPELLANT'S CONSTITUTIONAL RIGHTS

This is an unprecedented case. Plaintiff-Appellant ("Mr. Kilpatrick") has been chosen by the People of Detroit to serve as their Mayor on two occasions.

> People have a right to have officers whom they elect serve out the terms for which they were elected. It is contemplated by the constitution that such officers shall not be removed except for causes specified and that the cause or causes must exist. The Governor may not act at pleasure or caprice.[4]

In spite of this proposition, Governor Granholm seeks to conduct removal proceedings prior to the Defendant's adjudication of guilt on any underlying charges. Article 1, § 17 of the Michigan Constitution guarantees to all Michigan citizens:

> The right of all individuals, firms, corporations and voluntary associations to fair and just treatment in the course of legislative and executive investigations and hearings shall not be infringed.

There is sparse case law analyzing the meaning of the fair and just treatment clause or the relationship of the fair and just treatment clause to the due process protections. Despite this, the plain language of the clause makes clear that fair *and* just treatment is the constitutional minimum required in every legislative and executive investigation and

4 People, ex rel. Johnson, v. Coffey, 237 Mich. App. 597-98 (1927), *citing* Metevier v. Therrien, 80 Mich. 187 (1890).

hearing.[5] The clause provides a substantive right to the people to address governmental abuses of authority. The removal hearing must, therefore, respect both the principles of fairness and justice in order to be constitutionally firm.[6]

The delegates at the constitutional convention of 1961 considered the relationship between due process and the fair and just treatment clause. One delegate explained the purpose of the fair and just treatment clause as follows:

> It may be asked, does not the due process clause protect the individual against unfair and unjust treatment? Yes, but not in executive or legislative investigations. The fact is that the due process safeguards of a criminal trial have not been interpreted to apply to legislative or executive investigations. While many investigations have unfairly and unjustly assumed the character of a criminal trial and abused the prestige of government, the rights of the individuals, and our concept of separation of powers in doing so, the normal rights of the accused have not been judicially accorded to a witness in an investigation.[7]

Moreover, the same delegate explained that the reason for not applying the same due process principles to legislative and executive investigations and hearing was so as to not "encourage the trend of regarding legislative hearings as criminal trials."[8] In advocating for fair and just treatment, the framers noted that the clause was intended to delegate the task of developing fair and just treatment to the legislature, the executive and to the courts.[9] Therefore, although the fair and just treatment clause does not categorically

5 Jo-Dan, Ltd. v. Detroit Board of Education, No. 201406, 2000 Mich. App. LEXIS 1403, at *25 (2000).
6 Id.
7 Id. at *32.
8 Id. at *35.
9 Id. at **37-38.

impose the guarantees of procedural due process in a quasi-judicial hearing, "the courts may ultimately find that some of the procedures and other hallmarks of due process would be useful to enforce the right to fair and just treatment."[10]

Unlike the protections of due process, the fair and just treatment clause does not require a plaintiff to show that his life, liberty or property interests are at stake before being afforded relief from unfair or unjust treatment in a hearing.[11] Rather, the goal of the fair and just treatment clause is to protect individual rights in hearings and investigations because due process may not.[12] This inquiry is fact sensitive and all of the remedies are available for violations of the fair and just treatment clause.[13]

The removal hearing in the present matter is a quasi-judicial proceeding. Accordingly, Mr. Kilpatrick is entitled to an unbiased and impartial decision maker. Currently, Mr. Kilpatrick will be deprived of his right to fair and just treatment in the removal hearing with the Governor as the finder of fact.

For the following reasons, a removal hearing presided by the Governor would be both unfair and unjust. First, the Governor is not an unbiased fact finder. Second, the procedures outlined by the Governor do not sufficiently provide Mr. Kilpatrick an opportunity to properly defend himself. Last, MCL § 168.327, the statute that the Governor relies on for the removal proceeding, is impermissibly vague. This statute provides little notice of what conduct might subject Mr. Kilpatrick to removal and grants

10 Id. at *38.
11 Id. at **30-31 (2000).
12 Id. at *36.
13 Id. at *42.

unfettered discretion to the Governor to remove him based on a nebulous evidentiary standard.

This Honorable Court must exercise its authority and obligation to the People of the State of Michigan by upholding the provisions of the Michigan Constitution.

A. The Statute Relied Upon by the Governor for the Removal Proceeding is Impermissibly Vague

A statute is void for vagueness if it does not provide fair notice of the conduct proscribed or it is so indefinite that it confers unstructured and unlimited discretion on the trier of fact to determine whether it has been violated.[14] Furthermore, a statute is impermissibly vague when it "leaves judges and jurors free to decide without any legally fixed standards, what is prohibited and what is not in each particular case."[15] A statute that lacks sufficient standards may permit a trier of fact to pursue his or her own predilections.[16] The legislature must establish minimal guidelines to promote fair enforcement of a statute.[17] The goal of this doctrine is to ensure that the State cannot hold people responsible for conduct that they could not reasonably understand to be proscribed.[18] In this case, the removal statute violates both of these principles and any proceeding pursuant to it cannot be called fair or just.

Fair and just treatment as is guaranteed under the Michigan Constitution must

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14 Dep't of State Compliance & Rules Division v. Michigan Education Association-NEA, 251 Mich. App. 110, 116, 650 N.W.2d 120 (2002); *(See* also Proctor v. White Lake Township Police Dept., 248 Mich. App. 457, 467 (2002).

15 Giacco v. State of Pennsylvania, 382 U.S. 399, 402-03 (1966).

16 *See* Kolender v. Lawson, 461 U.S. 352, 358 (1983).

17 Id.

18 Sillery v. Bd. of Medicine, 145 Mich. App. 681, 686 (1985).

require that the fact finder be bound by some discernible standard. Despite this, MCL § 168.327 calls for removal for undefined "official misconduct" when the Governor is "satisfied" that a finding of such misconduct is supported by "sufficient evidence."

The Michigan Supreme Court instructed that when "official misconduct" is the grounds for removal:

> the misconduct which shall warrant a removal of the officer must be such as affects his performance of his duties as an officer an not such only as affect his character as a private individual.[19]

Under MCL § 168.327, the level of proof required in support of Mr. Kilpatrick's removal is that the Governor is "satisfied" that there is "sufficient evidence" of "official misconduct." This is an illusory standard.

The statute fails to define any of these terms and provides no guidance as to how the standard of proof is to be measured or tested. "Satisfactory evidence" is incapable of being defined objectively and effectively tested.

On August 28, 2008, in a telephone conference with the Governor's aids, the aids indicated that the Governor equates "sufficient evidence" with "satisfactory evidence," and that "satisfactory evidence" is evidence to satisfy an unprejudiced mind as to the truthfulness of the matter alleged. This standard is vague, subjective only in the mind of the sovereign, and capable of multiple interpretations. Furthermore, the term "official misconduct" is not defined in the Michigan Constitution nor in the applicable Michigan

19 Carroll v. City Commission of Grand Rapids, 265 Mich. 51, 58, 251 N.W. 381 (1933) (*Citing* Mechem, Public Offices and Officers, § 457).

Election Law.

There simply is no way for one to prepare a case so as to refute that the party bringing the complaint has provided "sufficient evidence" to "satisfy" the Governor. The strictures of this nebulous standard render Mr. Kilpatrick totally unable to properly defend himself in this matter.

B. The Removal Hearing Procedures Deny Mr. Kilpatrick an Opportunity to Properly Defend Himself

In a phone conference on Thursday, August 28, 2008, with the Governor's administrative aid, the rules and procedures for the hearing were dictated to Mr. Kilpatrick's counsel. Upon information and belief, it was to be followed by a written order signed by the Governor. As of September 1, 2008, it has not yet been received. The procedures outlined by the Governor's staff do not provide for the compulsory appearance of witnesses, and allows for the relaxed rules on the admissibility of evidence which undermines Kilpatrick's constitutional guarantee to be able to present meaningful evidence as well as the right to confront the witnesses against him. Further, the procedures permit the admission and consideration of evidence which has been proffered at deposition without the elimination of objected to evidence, which further complicates the proceedings. The real possibility exists that under the procedures dictated in that phone conference, the Governor will be making her decision based upon inadmissible evidence, privileged matters between attorney and client, conclusory statements and rank hearsay without the ability to cross-examine those witnesses.

Under the current procedure as described by the Governor's staff, counsel for the City Council will produce few witnesses in support of its petition to remove Kilpatrick. Instead, he will be relying upon transcripts of proceedings where there was no cross examination or ability to confront the witness. In addition, the Governor has yet to rule upon issues of privilege that are at issue with respect to those documents, thereby violating rights that are guaranteed by the Constitution of the United States and the Constitution of the State of Michigan.

Plainly, Mr. Kilpatrick will be denied his right to fair and just treatment if the removal hearing proceeds pursuant to MCL § 168.327 and the procedures and evidentiary rules that have been provided.

C. The Governor, Through Her Statements and Actions, Has Shown that She Cannot Be An Unbiased Fact Finder in The Removal Proceeding

The core of fairness in adjudicative proceedings is a neutral and disinterested decision maker.[20] In order to ensure that Mr. Kilpatrick's right to fair and just treatment is protected, this Honorable Court should look to related guarantees in judicial proceedings, including the right to an unbiased and impartial fact finder. Michigan court rules allow for disqualification of a judge when he or she is personally biased for or against a party.[21] Bias in this context has been defined as "'an attitude or state of mind that belies an aversion or hostility of a kind or degree that a fair-minded person could not entirely set

20 *See* Williams v. Hofley Manufacturing Co., 430 Mich. 603, 617-18 (1988).
21 MCR 2.003(B)(1).

aside when judging certain persons or causes."[22]

Mr. Kilpatrick is entitled to a hearing before an unbiased and impartial decision maker presiding over the removal proceeding. Mr. Kilpatrick is not required to make a showing of actual bias.[23] Evidence of bias is present where the decision maker:

1. has a pecuniary interest in the outcome;
2. was the target of personal abuse or criticism from the party before him;
3. was involved in other matters related to the party, or
4. might have prejudged the case because of prior participation in the matter.[24]

In the above instances, the probability of actual bias on the part of the decision maker is too high to be tolerable.

Similarly, the Due Process Clause requires a decision maker to be unbiased and impartial; a fair tribunal is a basic tenement of due process in both administrative hearings as well as judicial hearings.[25] Courts have consistently recognized that "due process demands impartiality on the part of those who function in a judicial or quasi-judicial capacities."[26] The judicial system has long endeavored to prevent even the probability of unfairness through actual bias.[27] There is no compelling reason why the same fundamental notions should not apply to the Governor's quasi-judicial removal hearing.

Plaintiff-Appellant specifically addresses the fourth provision of the bias analogy

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22 Cain v. Michigan Dept. of Corrections, 451 Mich. 470, 495, fn. 29 (1996)(*quoting* United States v. Conforte, 624 F.2d 869, 881 (9th Cir., 1980)).
23 Rose v. Houghton Lake Ambulance Serv., No. 242327, 2004 Mich. App. LEXIS 719, at *2-3 (2004).
24 Id. at * 3.
25 Cain, 451 Mich. at 497, 499.
26 Nat'l Labor Relations Bd. v. Ohio New and Rebuilt Parts, Inc., 760 F.2d 1443, 1450 (6th Cir., 1985).
27 Cain, 451 Mich. at 499.

in support of his claim for fair and just treatment. Governor Granholm's numerous public statements to the media reveal the probability that she has an actual bias in favor of removing Kilpatrick from office. The evidence, while inferential, doe show a substantial tendency for bias. Specifically, the Governor has repeatedly indicated that a quick resolution to Mr. Kilpatrick's situation is necessary for the good of the State of Michigan. Presently, the only means to a quick resolution within the Governor's control is for her to remove him from his office pursuant to MCL § 168.327. The following are a series of examples of statements that has been made in the media by the Governor:

a. "[The Governor]" says she hopes the situation can be resolved quickly." Ex. 1.
b. "Granholm says its important to turn the page and move forward because Detroit has a lot of positive momentum." Ex. 1.
c. "'This crisis has to be put behind us quickly, the faster the better – whatever that means.'" Ex. 2.
d. "'We have a ton of joint projects we are working on together and we've got to keep the momentum going. We don't want this scandal to be slowing down that progress.'" Ex. 2.
e. "'None of this is good, for the city, for the state. Whatever happens has to happen quickly so that we can turn the page and go to work,'" she said. 'There is no way you can spin any of this to be positive.'" Ex. 3.

The references to a speedy resolution, turning the page, put behind us quickly, all refer to a change, all of which would be at the expense of the Mayor. The actions of City Council, the unprecedented media coverage, and the calls for the resignation of the Mayor can only be satisfied upon the Governor's proposed precipitous action to remove Mr. Kilpatrick as the Mayor. It makes no sense otherwise. How do you turn a page or

put the matter behind unless the Governor acts to remove? The speedy resolution, the turning of the page, the putting of this matter behind us can only be satisfied by a change. To say that it implies anything different would be disingenuous and defy logic.

In addition to the above comments, the Governor made other statements to the press that further support her predisposition to remove Mr. Kilpatrick from office. These statements include the following conclusory language:

a. "Governor Granholm says she doesn't know if Detroit Mayor Kwame Kilpatrick can survive a scandal involving sexually explicit text messages between the mayor and his top aide." Ex. 1.
b. "Granholm says the scandal is bad for the image of Detroit and Michigan." Ex. 1.
c. "'I hope this is unprecedented and remains unprecedented because we certainly don't want to see a repeat of this in any way, shape or form,' she said." Ex. 3.

Any notion of fairness requires that the decision as to the Mayor's conduct be left up and until both sides have presented their evidence in the matter. Any comments in the media should be, at the very least, impartial because she is the trier of fact. Her comments to the media illustrate her predetermined position on this matter.

Beyond this, on May 27, 2008, Governor Granholm met with the Mayor's attorneys Sharon McPhail, James C. Thomas and Prosecutor Kym Worthy, and Worthy's assistant prosecutors, to discuss a global resolution of the matters pending against Kilpatrick. This meeting was scheduled at the Governor's behest. While it was considered to be a confidential meeting between the above named parties, the Governor breached that confidentiality by communicating the content of the discussions to third

parties without prior consent of all involved. As a result of her or her staff's contact with third parties, it is believed that meeting was widely publicized.

It was apparent from the presentation at this meeting that the Governor had not considered Mr. Kilpatrick's innocence. To the contrary, at this meeting, the Governor and her staff had prepared a blackboard scenario in which his presumption of innocence was ignored and significantly undercut. When counsel attempted to explain that there were significant factual and legal issues, the Governor ignored the issues presented, indicating Kilpatrick had to resign because it was making Michigan look bad. When attorney McPhail again protested that Kilpatrick had viable defenses to the charges, the Governor responded that it did not matter. See Affidavit of Counsel, Ex. 4 and 5.

The Governor may argue that, despite any form of bias on her part, she must still hold the removal proceeding because of the common law rule of necessity.[28] The rule of necessity, as applied to adjudicative officers, provides that they are not disqualified because of bias, prejudice or prejudgment of the issues where they alone have the power and authority to act and where, if they were to be disqualified, action cannot otherwise be taken and a failure of justice would result.[29]

The concept of "necessity" is to be construed narrowly, in favor of delegating

28 In her Response to the Plaintiff's Motion for a Temporary Restraining Order, the Governor relied on United States v. Will, 449 U.S. 200 (1980) and Evans v. Gore, 253 U.S. 245 (1920). This reliance is misplaced. Both of these cases discuss instances where judges had personal pecuniary interests in the outcome of the cases. (See Will, 449 U.S. 200 [considering whether the judges had a duty to recuse themselves because the case pertained to the level of compensation they were to receive]; Evans, 253 U.S. 245 [finding that the plaintiff judge was entitled to bring an action related to his own compensation]). In the present matter, Mr. Kilpatrick alleges that the Governor is unfairly biased to the extent that a failure of justice would result if she were to act as a fact finder in the removal hearing.

29 Acme Brick Co. v. Missouri Pacific Railroad Co., 821 S.W.2d 7, 10 (Ark. 1991).

judicial authority to others whenever possible.[30] The doctrine of necessity should only be invoked in those instances where the matter cannot be set aside until a later date, and there is no alternative forum able to grant the same relief.[31]

The anticipated argument of necessity does not save the Governor's hearing at this time because the Governor herself could easily stay the proceedings before her pending the outcome of Kilpatrick's criminal trial, which regardless of outcome, would resolve the issue of removal altogether.[32]

As a result of the Governor's reported unfair bias and partiality regarding Mr. Kilpatrick's removal from office, the hearing scheduled for September 3, 2008 will not provide Mr. Kilpatrick with the fair and just treatment he is entitled to under the Michigan Constitution. This Honorable Court can only protect Mr. Kilpatrick's constitutional rights by reversing Judge Ziolkowski's decision to deny Plaintiff-Appellant a temporary restraining order enjoining the Governor from conducting the removal proceedings.

CONCLUSION

For the reasons set forth above, the removal proceeding regime denies Mr. Kilpatrick to a fair and just quasi-judicial hearing before the Governor. The Governor has exhibited a bias in this matter, the proceeding prevents Mr. Kilpatrick from mounting a proper defense and the statute authorizing this proceeding is impermissibly vague.

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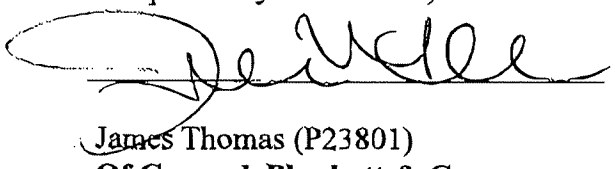
30 In the Matter of General Motors Corp. v. Rosa, 624 N.E.2d 142, 145 (N.Y. 1993).
31 Allen v. Toms River Regional Bd. of Education, 559 A.2d 883, 887-88 (N.J. Super. Ct. 1989).
32 In the event that the Mayor is convicted, he will be removed from office as a matter of law. *See* MCL § 201.3.

Therefore, in order to maintain his constitutional rights, this Honorable Court must enjoin the removal proceeding by GRANTING Plaintiff-Appellant's Application for Leave to Appeal and REVERSING the decision of the Court of Appeals.

RELIEF REQUESTED

WHEREFORE, Mr. Kilpatrick prays this Honorable Court to grant the instant Application for Leave to Appeal and reverse the Court of Appeals decision affirming the denial of a Temporary Restraining Order and Preliminary Injunction to enjoin the Governor from commencing and/or continuing the Removal proceedings against Mr. Kilpatrick.

Respectfully Submitted,



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